

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 FERNANDO HERNANDEZ, KENNETH CHOW,
5 BRYANT WHITE, DAVID WILLIAMS,
6 MARQUIS ACKLIN, CECILIA JACKSON,
7 TERESA JACKSON, MICHAEL LATTIMORE,
8 and JUANY GUZMAN, each individually,
9 and on behalf of all other persons
10 similarly situated,

11 Plaintiffs,

Case No.
12-CV-4339
(ALC) (JLC)

12 -against-

13 THE FRESH DIET, INC., LATE NIGHT
14 EXPRESS COURIER SERVICES, INC. (FL),
15 FRESH DIET EXPRESS CORP. (NY), THE
16 FRESH DIET - NY INC. (NY), FRESH
17 DIET GRAB & CO, INC. (FL) a/k/a YS
18 CATERING HOLDINGS, INC. (FL) d/b/a
19 YS CATERING INC. (FL), FRESH DIET
20 EXPRESS CORP. (FL), SYED HUSSAIN,
21 individually, JUDAH SCHLOSS,
22 individually, and ZALMI DUCHMAN,
23 individually,

24 Defendants.

25 -----x

Deposition of SYED HUSSAIN, taken on behalf of
Plaintiffs, at THE HARMAN FIRM, 1776 Broadway, Suite
2030, New York, New York 10019, commencing at 10:16
a.m., Thursday, October 10, 2013, before Deborah
Huntsman, a Shorthand Reporter and Notary Public of
the State of New York.

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REPORTED BY: DEBORAH HUNTSMAN
FILE NO.: A70ACAE

1 A. For Late Night, no.
 2 Q. Were you doing it for any other company?
 3 A. For Balance for Life, I think I was. I am not
 4 sure.
 5 Q. I don't want to talk about Balance for Life.
 6 That was a long time ago. Let's just stick with Late
 7 Night. Do you recall the circumstances under which
 8 you acquired this responsibility for payment?
 9 A. No.
 10 Q. Did someone ask you to start doing this?
 11 A. I don't recall.
 12 Q. Did somebody explain to you how you were to do
 13 this?
 14 A. Yes, I am sure.
 15 Q. But you don't recall who that person was?
 16 A. No.
 17 Q. But it is your recollection that the way you
 18 were supposed to do this was to determine the stops
 19 and miles of each driver?
 20 A. Correct.
 21 Q. You would determine this by reviewing
 22 manifests?
 23 A. Yes.
 24 Q. Anything else that you would look at to make
 25 this determination?

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1 Q. You would calculate their pay based on what you
 2 determined to be their stops and their miles for that
 3 week?
 4 A. Yes.
 5 Q. Were the drivers paid once a week?
 6 A. Yes.
 7 Q. Once you calculated the stops and miles that a
 8 particular driver had made or had driven in a
 9 particular week, what did you do with that
 10 information?
 11 A. What do you mean?
 12 Q. Did you have to enter it into a computer?
 13 A. Yes.
 14 Q. Did Late Night use a payroll processing
 15 company?
 16 A. Not that I am aware of.
 17 Q. So you would look at the number of stops and
 18 the miles driven for each driver, and you would enter
 19 this data into a computer. Is it your testimony, on
 20 the basis of that entry, that a check was generated
 21 for the driver?
 22 A. That information would then be e-mailed.
 23 Q. To whom?
 24 A. It changed over time.
 25 Q. When you first had this responsibility, who

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1 A. It depends. It would also depend on if the
 2 manifest was incorrect as far as the stops and the
 3 miles, and the drivers would correct it and let me
 4 know.
 5 Q. So were there instances where the manifests
 6 were incorrect?
 7 A. Yes.
 8 Q. In what ways would a manifest be incorrect?
 9 A. If there are two stops in one building in
 10 Manhattan and the system would recognize it only as
 11 one stop.
 12 Q. Any other ways in which a manifest might be
 13 incorrect?
 14 A. If there is a roadblock and the driver detours,
 15 the miles change.
 16 Q. Sometimes drivers would bring these errors to
 17 your attention?
 18 A. Yes.
 19 Q. You would investigate what they told you about
 20 the problems with the manifests?
 21 A. Yes.
 22 Q. If you determined that the manifests were,
 23 indeed, incorrect with respect to either the number of
 24 stops or the miles driven, you would make adjustments?
 25 A. Yes.

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1 were you e-mailing?
 2 A. I think it was Camillo Tobon and Carlo Ritchie.
 3 Then it changed to Sandy Ornelas.
 4 Q. Were these people all in Florida?
 5 A. No.
 6 Q. Was anybody in New York?
 7 A. No.
 8 Q. They were in different parts of the country?
 9 A. Yes.
 10 Q. The information that you had to e-mail to these
 11 people were the number of stops and the number of
 12 miles driven per driver?
 13 A. Yes.
 14 Q. Any other data that you would have to report?
 15 A. No.
 16 Q. Just the number of stops and the number of
 17 miles driven?
 18 MR. POLLACK: Objection.
 19 A. For payroll?
 20 Q. For payroll, yes.
 21 A. Yes.
 22 Q. Just limiting ourselves now to talking about
 23 how payroll was done. What would happen after that
 24 point?
 25 A. I am sorry. Let me correct that. For payroll

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1 it was the stops they made, the miles they drove, and
2 bags that were delivered.

3 Q. And the number of bags that were delivered?

4 A. Yes.

5 Q. You would e-mail that information to one of
6 several people?

7 A. Correct.

8 Q. Then what would happen after you would e-mail
9 that information to them?

10 MR. POLLACK: Objection.

11 A. I don't know.

12 Q. Would checks be generated for the drivers?

13 MR. POLLACK: Objection.

14 A. I don't know the process.

15 Q. Would checks eventually arrive at Siegel
16 Street?

17 A. Yes.

18 Q. Were you given the checks to distribute to the
19 drivers at Siegel Street?

20 A. Yes.

21 Q. Do you recall how you received those checks?

22 A. No.

23 Q. Did they come in the mail?

24 A. FedEx.

25 Q. Was the FedEx addressed to you?

110

1 Q. This began at Siegel Street?

2 A. Yes.

3 Q. Do you recall what types of questions you
4 received from drivers?

5 A. Discrepancy in pay, if the stops and miles
6 didn't add up.

7 Q. If you got such an inquiry from a driver, what
8 would you do to respond to it?

9 A. I would investigate it and see if it was
10 correct or not. If their math was correct or if my
11 math was incorrect, whatever the case would be.

12 Q. How would you do that?

13 A. I would do that based upon the information on
14 the manifest and the information that I would input
15 into the computer.

16 Q. So you would still have the manifest in your
17 possession at the time that the checks were
18 distributed for that week?

19 A. Yes.

20 Q. You wouldn't have thrown out any manifests
21 before checks were distributed for the week?

22 A. I had digital files.

23 Q. You had digital files?

24 A. Yes.

25 Q. When you say you had digital files, were the

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1 A. I do not remember.

2 Q. Would you open the FedEx box?

3 A. Usually.

4 Q. So you would open the FedEx package where the
5 checks were?

6 A. Yes.

7 Q. Did you review the checks before distributing
8 them to the drivers?

9 A. No.

10 Q. Were they sealed or in envelopes?

11 A. Yes.

12 Q. They had the driver's name on them?

13 A. Yes.

14 Q. On payday, how would you distribute the checks
15 to the drivers?

16 A. I would just hand it to them.

17 Q. You would see a driver and say, "I have your
18 check"?

19 A. Yes.

20 Q. But you didn't actually review the checks
21 yourself?

22 A. No.

23 Q. Did drivers ever come to you with questions
24 about their checks?

25 A. Yes.

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1 return manifests scanned?

2 A. No.

3 Q. So how was the information on the return
4 manifests maintained?

5 A. In the report for the night.

6 Q. In your report for the night to whom?

7 A. For inventory purposes, for customer service
8 purposes, and we also used it for payroll.

9 Q. So if you got an inquiry from a driver about
10 his or her paycheck, you might not have had each day's
11 manifest available to you at the time?

12 A. Which manifest are we talking about?

13 Q. The manifest for the week being covered by the
14 pay?

15 A. I would have them in my computer.

16 Q. Would you have the entire manifest for each day
17 reproduced or scanned on your computer?

18 A. No.

19 Q. How would you transfer the information from the
20 manifest onto your computer?

21 A. In a report.

22 Q. But my question is: what information would you
23 take from the manifest and enter into your computer?

24 A. The number of bags the driver delivered, the
25 miles they drove, the stops they did, and the number

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1 of bags they picked up.

2 Q. So it was a tabulation of figures?

3 A. Yes.

4 Q. It wasn't the actual manifest itself that was
5 uploaded into your computer?

6 A. No.

7 Q. So if a driver came to you and said, "I don't
8 think my check is right," you would investigate by
9 looking at the information that you just described
10 that you had taken off of the manifest and entered
11 into your computer?

12 A. In the beginning, yes.

13 Q. And you would make a determination as to
14 whether there might be an error?

15 A. Correct.

16 Q. If there was, in fact, an error and the driver
17 had been undercompensated, what would you do?

18 A. I would rectify it.

19 Q. How would you rectify it?

20 A. In the following week's payroll. Adjust it.

21 Q. You would do that by reporting the revised
22 figures by e-mail to other people?

23 A. Correct.

24 Q. The new checks would come in the following week
25 that had the adjusted amounts in them?

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1 BY MR. ANDREWS:

2 Q. Mr. Hussain, we are back on the record after a
3 lunch break. I hope you will be a little warmer this
4 afternoon than you were this morning.

5 Mr. Hussain, what do you do presently?

6 A. Presently I am the director of logistics for
7 The Fresh Diet.

8 Q. Director of logistics for The Fresh Diet?

9 A. Yes.

10 Q. When did you assume that position?

11 A. September 1st.

12 Q. Of this year, 2013?

13 A. Yes.

14 Q. Prior to September 1st, what were the position
15 that you held?

16 A. I was the New York regional manager for Late
17 Night.

18 Q. That was your title, New York regional manager?

19 A. Yes.

20 Q. Do you know why the change was made as of
21 September 1st?

22 A. There was a promotion.

23 Q. It was a promotion. How are your duties now
24 different than they were prior to September 1st?

25 A. I oversee the logistics of the entire North

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1 A. Yes.

2 Q. Now, you said in the beginning before, what did
3 you mean by that?

4 A. Eventually I started saving the physical
5 manifests.

6 Q. For how long would you save them?

7 A. Until the checks came and there were no
8 discrepancies.

9 Q. Is there a reason why you started keeping the
10 physical manifests when you had not been doing so
11 before?

12 A. I do not remember the reason.

13 Q. Then after the paychecks were distributed, the
14 manifests would ultimately be discarded?

15 A. Yes.

16 MR. ANDREWS: I think this a good place to stop
17 for lunch.

18 (Whereupon, from 12:38 p.m. to 1:35 p.m. a
19 recess was taken.)

20 MR. POLLACK: I want to clarify for the record
21 that Mr. Hussain is being produced individually and as
22 the corporate representative, 30B(6) witness, for Late
23 Night today, and I am going to request a copy of his
24 transcript for him to review and make changes to
25 pursuant to Rule 30B.

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1 American distribution for Fresh Diet.

2 Q. You are based in New York City now?

3 A. Yes.

4 Q. So you are no longer responsible just for the
5 New York tri-state area?

6 A. No.

7 Q. Do you still work out of the Baltic Street
8 facility?

9 A. Yes.

10 Q. Do you still assign deliveries to drivers?

11 A. No.

12 Q. So you are no long responsible for handing out
13 deliveries or routes to drivers?

14 A. No.

15 Q. Do you know who in the tri-state area is doing
16 that now?

17 A. Yes.

18 Q. Who is that?

19 A. Owen Dacres.

20 Q. Does Mr. Dacres report to you?

21 A. Yes.

22 Q. Does Late Night Express still exist as an
23 active company?

24 A. I don't know.

25 Q. Does Mr. Dacres work for Late Night Express or

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1 for The Fresh Diet?

2 A. I don't know.

3 Q. As of September 1st, how are you compensated in

4 your current position?

5 A. A salary.

6 Q. That is an annual salary?

7 A. Yes.

8 Q. Who do you report to today?

9 A. I report to Asif Syed.

10 Q. Who is that?

11 A. I would have to give you his information. I

12 don't have it off the top of my head.

13 Q. Is it someone who works for The Fresh Diet?

14 A. Yes.

15 Q. Do you know where he is located?

16 A. Yes.

17 Q. Is he located in Florida?

18 A. Yes.

19 Q. Do you report to anyone else other than Asif

20 Syed?

21 A. Currently, no.

22 Q. I would like to go back to the time before

23 September 1st, when you were New York regional

24 manager, was that New York regional manager for Late

25 Night Express?

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1 A. I don't know her exact title.

2 Q. Do you recall what she was responsible for?

3 A. No.

4 Q. Was she the human resources director?

5 MR. POLLACK: Objection.

6 A. If she was, not to my knowledge.

7 Q. Did she work for The Fresh Diet or for Late

8 Night?

9 MR. POLLACK: Objection.

10 A. I don't know.

11 Q. Ms. Ornelas, she was in Florida at the time?

12 A. No.

13 Q. Where was she working at the time?

14 A. In California.

15 Q. She told you that Fresh Diet had decided that

16 you would become the New York regional manager for

17 Late Night?

18 MR. POLLACK: Objection.

19 A. No.

20 Q. Do you recall what she told you?

21 A. I don't recall the conversation.

22 Q. But you do recall that she told you that you

23 would be becoming the New York regional manager?

24 A. Yes.

25 Q. When you became the New York regional manager,

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1 A. Yes.

2 Q. How long were you New York regional manager for

3 Late Night Express?

4 A. I don't remember the amount of time.

5 Q. What was the position that you held with Late

6 Night before becoming regional manager?

7 A. There was no position.

8 Q. There was no position before that?

9 A. No title.

10 Q. Did you ever hold the title of delivery

11 manager?

12 A. I don't recall. I do know that it was New York

13 regional manager.

14 Q. Do you recall when you became the New York

15 regional manager?

16 A. Sometime in Siegel Street.

17 Q. Do you recall who told you that you would

18 become the New York regional manager?

19 A. Yes.

20 Q. Who was that?

21 A. Sandy Ornelas.

22 Q. Who was Sandy Ornelas at the time that she told

23 you of that decision?

24 MR. POLLACK: Objection.

25 Q. If you know?

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1 how were you compensated?

2 A. Salary.

3 Q. It was an annual salary?

4 A. Yes.

5 Q. It was a fixed annual salary?

6 A. Yes.

7 Q. Do you recall what your first salary was as

8 regional manager for Late Night?

9 A. No.

10 Q. Do you recall if it was over \$60,000 a year?

11 A. No.

12 Q. Do you recall if was under \$60,000 a year?

13 A. Yes.

14 Q. It was under \$60,000. Did your salary change

15 at any point as regional manager?

16 A. Yes.

17 Q. Did you get a raise?

18 A. Yes.

19 Q. Do you recall how much the raise was?

20 A. No.

21 Q. Was it more than \$10,000?

22 A. I am not sure.

23 Q. Do you recall what your last salary was as

24 regional manager immediately prior to September 1st of

25 this year?

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1 A. Yes.
2 Q. What was that salary?
3 A. \$52,000.
4 Q. That is a higher figure than the salary you
5 started with when you became New York regional
6 manager?
7 A. Yes.
8 Q. When you first became New York regional
9 manager, and you testified that it was sometime at
10 Siegel Street, what were the responsibilities that you
11 had as New York regional manager?
12 A. The same responsibilities as I stated before.
13 The manifest.
14 Q. Preparation of the manifest?
15 A. Yes. Preparation of the manifests, the reports
16 to customer service, coordinating with customer
17 service, assisting in case there were any delivery
18 issues, and the pay for the drivers.
19 Q. The payroll?
20 A. Yes.
21 Q. Calculating the payroll or entering the data?
22 A. Entering the data.
23 Q. Entering the data, responding to inquiries from
24 drivers about their paychecks?
25 A. Yes.

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1 manager, did you know what the relationship was
2 between Late Night and Fresh Diet?
3 A. No.
4 Q. Do you know if Fresh Diet owns Late Night?
5 A. No, I don't know.
6 Q. Do you know if Zalmi Duchman owns Late Night?
7 A. I don't know for sure.
8 Q. You said you don't know for sure. Do you think
9 Zalmi Duchman owns Late Night?
10 MR. POLLACK: Objection.
11 A. I would rather not speculate.
12 Q. During the entire time that you have done work
13 for Late Night up until September 1st, did you ever
14 have to report to anyone at Late Night above you?
15 A. Not to my knowledge. I don't know who was at
16 Late Night above me, so I would not know how to answer
17 that question.
18 Q. Do you know if there was anyone at Late Night
19 above you?
20 A. I don't know.
21 Q. Is it possible that there was no one at Late
22 Night above you?
23 MR. POLLACK: Objection.
24 A. I don't know and I don't want to speculate.
25 Q. During the time that you were New York regional

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1 Q. And investigating complaints of missed
2 deliveries?
3 A. Yes.
4 Q. Now, as New York regional manager, it was also
5 your responsibility to ensure that the meals, in fact,
6 were delivered each night?
7 A. Yes.
8 Q. If meals were not being delivered to the
9 customers, that would be ultimately your
10 responsibility?
11 A. Yes.
12 Q. You would be accountable to The Fresh Diet
13 management if there were problems with meals not being
14 delivered?
15 MR. POLLACK: Objection.
16 A. I am not sure how that would work corporate
17 structure-wise.
18 Q. I am not asking about the corporate structure.
19 I am asking about your responsibility. Your
20 responsibility was to make sure that the meals got
21 delivered?
22 A. Yes.
23 Q. That was part of your job?
24 A. Yes.
25 Q. At the time you became New York regional

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1 manager and a salaried employee, did you have a
2 contract with Late Night?
3 MR. POLLACK: Objection.
4 A. No.
5 Q. Did you have a contract with The Fresh Diet?
6 A. No.
7 Q. Were you an employee at will?
8 MR. POLLACK: Objection.
9 A. I don't understand the question.
10 Q. If Late Night wanted to terminate your
11 employment, is it your understanding that they could?
12 A. I don't know.
13 Q. If you wanted to quit your job, could you have
14 quit?
15 A. Yes.
16 Q. Did there come a point in time during your time
17 at Late Night where you became responsible for
18 assigning specific routes to drivers?
19 A. I don't understand what you mean by "specific
20 routes to drivers."
21 Q. Well, you testified earlier that early in your
22 career with Late Night one of the things that you had
23 to do was receive e-mails of the different delivery
24 routes, print them out, and make them available to
25 drivers who were interested. Do you recall that

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1 testimony?

2 A. Yes.

3 Q. You testified, I believe, that it was handled

4 on a first come, first serve basis?

5 A. Yes.

6 Q. You testified that you yourself were not

7 responsible for actually evaluating drivers'

8 performance?

9 A. Yes.

10 Q. At that time?

11 A. Yes.

12 Q. That all you did was print out the routes and

13 hand them to drivers?

14 A. Yes.

15 MR. POLLACK: Objection.

16 Q. You recall that testimony?

17 A. Yes.

18 Q. Did there come a time when you became

19 responsible for ensuring that drivers were actually

20 completing their routes in the proper manner?

21 MR. POLLACK: Objection.

22 A. Like I said, drivers -- if the driver completed

23 their route and there were no complaints, that would

24 be it. There would be no reason for me to get any

25 information or check up on them.

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1 A. No.

2 Q. How was it determined which driver would

3 receive which manifest?

4 A. Based on the driver's preference.

5 Q. What would happen if two drivers wanted the

6 same route?

7 A. The driver that was there first would have the

8 route.

9 Q. But if you felt that the driver was not

10 performing adequately, you could change the

11 assignment?

12 MR. POLLACK: Objection.

13 A. Then the driver would no longer be driving for

14 Late Night.

15 Q. So you could terminate a driver's assignment?

16 MR. POLLACK: Objection.

17 A. I could cancel their contract.

18 Q. Have you ever done that to a driver?

19 A. Yes.

20 Q. How would you go about doing that?

21 A. I would tell them that their services were

22 inadequate, and we would no longer have them under

23 contract.

24 Q. Would this be verbally or in writing?

25 A. Verbally.

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1 Q. I want to go back to what you said earlier

2 about how the routes were handed out or given to

3 drivers on a first come, first serve basis. Did there

4 come a time when that system changed?

5 A. It didn't change. It became a system where

6 drivers were comfortable with the routes they were

7 driving, and so they were taking the same routes.

8 Q. But did you have the discretion to alter those

9 routes, if you wanted to?

10 MR. POLLACK: Objection.

11 A. Alter?

12 Q. Assign another driver to a route?

13 MR. POLLACK: Objection.

14 A. It would depend on the circumstances.

15 Q. If a driver wasn't performing the route's

16 duties properly, could you assign another driver to

17 that route?

18 MR. POLLACK: Objection.

19 A. Yes.

20 Q. Now, you said drivers became comfortable with

21 particular routes?

22 A. Correct.

23 Q. When you began preparing the manifests, did you

24 determine which driver should be given which manifest?

25 MR. POLLACK: Objection.

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1 Q. When you first began preparing the manifests,

2 did you hand them out to the specific drivers?

3 MR. POLLACK: Objection.

4 A. Yes.

5 Q. So you knew which driver to hand which manifest

6 to?

7 MR. POLLACK: Objection.

8 A. Yes.

9 Q. How did you know which driver to hand which

10 manifest to?

11 A. Because the drivers were comfortable with doing

12 those routes.

13 Q. But you also had to be comfortable with their

14 performance on those routes; isn't that correct?

15 MR. POLLACK: Objection.

16 A. It is not about my comfort. I don't understand

17 the question.

18 Q. If you were not satisfied that they were

19 performing their routes properly, you would make a

20 change?

21 MR. POLLACK: Objection.

22 A. If they weren't delivering the bags per the

23 contract, then they would no longer be under contract

24 to work for Late Night.

25 Q. Did you ever change drivers' routes?

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1 MR. POLLACK: Objection.

2 A. Yes.

3 Q. What would be the circumstances under which you

4 would change a driver's route?

5 A. If they requested it.

6 Q. Would there be circumstances where you would

7 change a driver's route where they had not requested a

8 change?

9 A. Yes.

10 Q. Under what circumstances would you change a

11 driver's route where the driver himself or herself had

12 not requested a change?

13 A. If their performance of the route was

14 inadequate.

15 Q. When you say "inadequate," what types of issues

16 would constitute inadequate performance?

17 A. Missed deliveries.

18 Q. Anything else?

19 A. Late deliveries.

20 Q. Anything else?

21 A. Not that I am aware of right now.

22 Q. What about poor attendance?

23 MR. POLLACK: Objection.

24 A. No.

25 Q. Lateness?

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1 with you, wouldn't you?

2 MR. POLLACK: Objection.

3 A. I would look for drivers that would do the job

4 that they were contracted to do.

5 Q. You were responsible for making sure that they

6 were, in fact, doing the job that they were contracted

7 to do?

8 MR. POLLACK: Objection.

9 A. I don't understand the question.

10 Q. I mean, you were in charge in making sure that

11 meals got delivered?

12 A. Yes.

13 Q. Your concern as far as the drivers go was that

14 they were, in fact, delivering the meals?

15 A. Yes.

16 Q. Therefore, you had to make sure that drivers

17 were doing what they needed to be doing to deliver the

18 meals on time?

19 MR. POLLACK: Objection.

20 A. That would be evident the next day, if there

21 were no complaints.

22 Q. If a driver who was scheduled to make

23 deliveries on a particular route sent you a text or an

24 e-mail saying that he was going to be three hours

25 late, would that concern you that evening?

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1 MR. POLLACK: Objection.

2 A. Late deliveries.

3 Q. Would it be fair to say that as the New York

4 regional manager for Late Night you were looking for

5 drivers you considered to be reliable?

6 A. Yes.

7 Q. You wouldn't want to work with drivers who were

8 unreliable?

9 MR. POLLACK: Objection.

10 A. Yes.

11 Q. You preferred drivers who were responsive to

12 you?

13 MR. POLLACK: Objection.

14 A. What do you mean by "responsive"?

15 Q. That they would listen to what you asked them

16 to do?

17 MR. POLLACK: Objection.

18 A. No.

19 Q. No?

20 A. No.

21 Q. You weren't looking for drivers that would

22 listen to what you asked them to do?

23 A. No. I would be looking for drivers that would

24 be delivering the bags with no issues.

25 Q. You would look for drivers who were cooperative

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1 MR. POLLACK: Objection.

2 A. No.

3 Q. You would let them still come in and make their

4 scheduled route?

5 A. As long as the food was delivered by the

6 contracted time, yes.

7 Q. So if you had a driver who you had expected to

8 deliver meals on a particular route and he had a

9 certain number of meals that he needed to deliver, and

10 he texted and said, "I am going to be three hours late

11 tonight," would you have attempted to get somebody

12 else to deliver the meals that night for that route?

13 MR. POLLACK: Objection.

14 A. That would depend on the circumstances.

15 Q. What factors would you take into account in

16 determining whether to give someone else that

17 responsibility for that night?

18 MR. POLLACK: Objection.

19 A. If a driver takes five hours to deliver 30

20 bags, and they are telling me that they are going to

21 be late and we deemed that they wouldn't be able to

22 finish it in time, then I would have to find a driver

23 to take some of those bags. So the driver would still

24 come in late, but we would adjust the route to make

25 sure that the bags were delivered by the time that

133

1 they were supposed to be.

2 Q. How would you make a determination as to
3 whether or not the driver would be able to complete
4 the deliveries in time?

5 A. Based on my conversation with that driver.

6 Q. Is it fair to say that over your experience you
7 have acquired some sense of how long it would take a
8 certain number of deliveries to be made on particular
9 routes?

10 A. In certain areas, yes.

11 Q. So would it be fair to say that in certain
12 circumstances for certain routes, if a driver
13 contacted you and told you that he was going to be
14 several hours late, you would know that there would be
15 at least a risk that the meals would not be delivered
16 on time?

17 MR. POLLACK: Objection.

18 A. Depending on the route, yes.

19 Q. This was based on your own experience as
20 somebody working at Late Night?

21 A. This was based on my experience working with
22 the routes and assessing drivers how long it takes
23 them to deliver.

24 Q. If a driver was going to be late on a
25 particular night, was he expected to contact you?

134

1 Q. Depending on the route and depending on the
2 time, you would have preferred to have known that the
3 person was going to be coming in very late?

4 MR. POLLACK: Objection.

5 A. Like I said, it is a professional courtesy.

6 Q. But if drivers are late and can't complete
7 their routes in time, it is also your problem; isn't
8 it?

9 MR. POLLACK: Objection.

10 A. If the complaints come in from customers, then
11 it is a problem.

12 Q. For you?

13 MR. POLLACK: Objection.

14 A. For the company.

15 Q. And for you?

16 MR. POLLACK: Objection.

17 A. I would be accountable for it, yes.

18 Q. That is what I mean. It would fall within your
19 area of accountability?

20 A. Yes.

21 Q. Because you were responsible for ensuring that
22 the meals got delivered on time?

23 MR. POLLACK: Objection. Asked and answered.

24 A. I was responsible for trying to make sure all
25 the meals got delivered on time.

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1 MR. POLLACK: Objection.

2 A. Was he expected to contact me?

3 Q. Yes.

4 A. I am not sure I understand the question.

5 Q. Well, if a driver was assigned to a particular
6 route on a particular evening, and you had an idea of
7 how long it typically took the driver to complete that
8 route, and you had gotten to know the driver over
9 time, and the driver was going to be several hours
10 late on one particular evening, is that the type of
11 information you would expect him to let you know
12 about earlier in the day?

13 MR. POLLACK: Objection.

14 A. Not really. It is not something that they are
15 required to do. It is just a professional courtesy.

16 Q. If someone showed up three hours late and they
17 had not let you know that they were showing up three
18 hours late and they had a large route to complete,
19 would that have concerned you?

20 MR. POLLACK: Objection.

21 A. Yes. Depending on the time and depending on
22 the size of the route.

23 Q. Depending on the size of the route and
24 depending on the time, it could concern you?

25 A. Yes.

135

1 Q. As New York regional delivery manager, did you
2 hold meetings with drivers at Baltic Street?

3 A. Yes.

4 Q. How often would you hold meetings with drivers?

5 A. I don't remember how often.

6 Q. Were they group meetings?

7 A. Yes.

8 Q. What types of things were discussed at these
9 meetings?

10 A. Changes in routes, seasonal delivery. The
11 deliveries are seasonal. They drop in the summer and
12 they drop again at Christmas. They go up in the new
13 year. So just to give drivers a heads up that there
14 was more work available or less work available.

15 Q. Now you said you were accountable for trying to
16 get the meals delivered on time?

17 A. Yes.

18 Q. Would it be fair to say that in order to meet
19 that objective, you wanted to know which drivers were
20 available to make deliveries on a particular evening?

21 MR. POLLACK: Objection.

22 A. Yes. I would like to know if all the routes
23 would be covered.

24 Q. If there were an issue with absenteeism or
25 lateness, you would have to make adjustments to make

137

1 sure the routes were covered; is that correct?

2 MR. POLLACK: Objection.

3 A. That would depend on the driver.

4 Q. But you would be responsible for finding other
5 drivers or assigning other drivers if a driver
6 couldn't make all his deliveries on a particular
7 night?

8 MR. POLLACK: Objection.

9 A. Yes.

10 Q. Is that something you, in fact, had to do from
11 time to time?

12 A. Yes.

13 Q. As New York regional manager, do you recall
14 texting drivers during the day, asking them about
15 their availability for the evening?

16 A. I am sure sometimes I did.

17 Q. Do you recall drivers texting you about their
18 availability for the evening?

19 A. Yes.

20 Q. Were drivers expected to tell you of their
21 availability for the evening by text?

22 A. Again, like I said, it is a professional
23 courtesy. If somebody is contracted to do a job, it
24 is just a courtesy that they let you know if they
25 can't come in.

138

1 A. I am sorry. Their lack of availability.

2 Q. If they failed to communicate their lack of
3 availability, and then they show up to work the next
4 day, would you speak to them about that?

5 A. Yes.

6 Q. Do you recall what you would tell them?

7 A. I don't recall what I would tell them.

8 Q. Would you tell them that you would have wanted
9 them to have been communicative?

10 MR. POLLACK: Objection.

11 A. Yes.

12 Q. Is it fair to say you would be disappointed if
13 a driver didn't show up to make his deliveries?

14 MR. POLLACK: Objection.

15 A. No.

16 Q. You wouldn't be disappointed if a driver didn't
17 show up?

18 MR. POLLACK: Objection.

19 A. No.

20 Q. But it would be your responsibility to arrange
21 for his route to be covered, if he did not show up?

22 MR. POLLACK: Objection.

23 A. If he didn't have his route covered, and I
24 hadn't heard from the driver and a certain amount of
25 time had passed, then I would have to find coverage

140

1 Q. Now, if you were trying to contact someone
2 during the day to assess his availability for that
3 evening and they were not responding to your texts,
4 could you make changes based on that lack of response?

5 MR. POLLACK: Objection.

6 A. It would depend at what time.

7 Q. If it got to be fairly late in the afternoon
8 and you had not heard from a particular driver, would
9 there be circumstances under which you would make
10 changes in the assignments?

11 MR. POLLACK: Objection.

12 A. It would have to be fairly late at night.

13 Q. Did you ever reprimand a driver for not
14 communicating his availability to you?

15 A. I wouldn't use the word "reprimand."

16 Q. Did you ever speak to a driver about his
17 failure to communicate his lack of availability to
18 you?

19 A. Yes.

20 Q. Under what circumstances would you speak to a
21 driver regarding his lack or failure to communicate
22 his lack of availability to you?

23 A. If they failed to communicate their
24 availability.

25 Q. If they failed to communicate --

139

1 for that route.

2 Q. As the New York regional manager, you could
3 take stops away from drivers if you felt that they
4 were unlikely to make all of their stops; is that
5 correct?

6 MR. POLLACK: Objection.

7 A. If there were problems on the routes. If they
8 weren't delivering on time, then I could make the
9 route smaller.

10 Q. Do you recall ever doing so?

11 A. No.

12 Q. Could you ask drivers to make additional stops
13 besides those on their regularly scheduled routes?

14 A. Yes.

15 Q. So if a driver did not come in and his or her
16 stops needed to be covered, you could ask other
17 drivers to make those stops?

18 A. Yes.

19 Q. You could adjust drivers' routes based on their
20 past performance?

21 MR. POLLACK: Objection.

22 A. Yes.

23 Q. Would it be fair to say, if someone had proven
24 to be a very reliable driver, you would be inclined to
25 ask them to make more stops?

141

1 MR. POLLACK: Objection.

2 A. No.

3 Q. Was good performance something that was taken

4 into account by you in determining whether a driver

5 should keep his route?

6 MR. POLLACK: Objection.

7 A. When you say "keep his route," what do you

8 mean?

9 Q. You said that you sometimes would reduce the

10 number of stops, if a driver had experienced

11 difficulty in making these stops?

12 A. Yes.

13 Q. If a driver in contrast proved to be a very

14 reliable driver and was, in your opinion, capable of

15 making lots of stops, you had the ability to ask them

16 to make additional stops; is that correct?

17 A. Yes.

18 Q. If a driver proved to be unreliable, you could

19 give them less work?

20 MR. POLLACK: Objection.

21 A. Are you asking me if a driver is unreliable,

22 would I not ask them to take additional stops?

23 Q. No. I asked if a driver had proven to be

24 unreliable and had missed lots of deliveries, you

25 could reduce the number of their stops?

142

1 MR. POLLACK: Objection.

2 A. The number of bags delivered.

3 Q. Any other information that you would enter?

4 A. For payroll purposes?

5 Q. Yes.

6 A. No.

7 Q. Were the hours the drivers actually worked

8 entered for payroll purposes?

9 MR. POLLACK: Objection.

10 A. Not by me.

11 Q. Do you know if they were entered by anyone

12 else?

13 A. Not to my knowledge.

14 Q. Were the drivers' hours of work tracked in any

15 way?

16 MR. POLLACK: Objection.

17 A. Not to my knowledge.

18 Q. Do you know of any way that you could

19 reconstruct the number of hours actually worked by

20 drivers?

21 MR. POLLACK: Objection.

22 A. Are you talking about the drivers at Siegel

23 Street?

24 Q. Let's stick with Siegel Street. I am sorry.

25 The current location is Baltic Street?

144

1 MR. POLLACK: Objection.

2 A. Yes.

3 Q. And you could in certain instances just stop

4 using them altogether?

5 A. Yes.

6 Q. You would do that by terminating their

7 contract?

8 MR. POLLACK: Objection.

9 A. Yes.

10 Q. Now, you testified that at some point you

11 assumed responsibility for preparing or helping to

12 prepare the payroll?

13 A. Yes.

14 Q. That is correct?

15 A. Yes.

16 Q. The way you did that was by taking information

17 off of manifests and entering them into a computer?

18 MR. POLLACK: Objection.

19 A. Yes.

20 Q. The information that you entered was the number

21 of stops and miles driven?

22 MR. POLLACK: Objection.

23 A. Correct.

24 Q. Was there any other information that you would

25 enter for payroll purposes?

143

1 A. Yes.

2 Q. Let stick with Baltic Street.

3 A. Okay.

4 Q. If a driver who had worked with you or for you

5 at Baltic Street asked you to reconstruct the number

6 of hours he had worked at a particular time, is there

7 any way you could do that?

8 MR. POLLACK: Objection.

9 A. It wouldn't be accurate.

10 Q. Why wouldn't it be accurate?

11 A. Because they don't have a schedule. They are

12 not clocking in and out.

13 Q. So there would be no records that would enable

14 you to reconstruct the time?

15 A. Like I said, not accurately.

16 Q. Now, in general at Baltic Street, by what time

17 of day were the meals supposed to have been delivered

18 to all customers?

19 A. By 5:00 a.m.

20 Q. If meals were being delivered after 5:00 a.m.,

21 these would be considered late deliveries, wouldn't

22 they?

23 A. Yes.

24 Q. Do you recall customers ever complaining about

25 late deliveries?

145

1 A. Yes.

2 Q. Now, I am talking about late deliveries, not
3 missed deliveries?

4 A. Yes.

5 Q. So sometimes customers would call in and
6 complain that their meal did not get to their home
7 until 7:00 a.m.?

8 MR. POLLACK: Objection.

9 A. Yes.

10 Q. If such a complaint was made, it was your
11 responsibility to investigate that complaint?

12 A. Yes.

13 Q. And to find out what had happened as to why the
14 meal had not been delivered by 5:00 a.m.?

15 MR. POLLACK: Objection.

16 A. Yes.

17 Q. You were accountable for trying to make sure
18 that all meals were delivered by 5:00 a.m.?

19 MR. POLLACK: Objection.

20 A. Yes.

21 Q. Do you ever recall warning drivers who were not
22 delivering their meals on time?

23 MR. POLLACK: Objection.

24 Q. That was poorly phrased. Do you recall ever
25 warning drivers who had failed to deliver meals by

146

1 MR. POLLACK: Objection.

2 A. Yes.

3 Q. Would that be a factor that you would take into
4 account in deciding whether the driver should even
5 continue to work with Late Night Express?

6 MR. POLLACK: Objection.

7 A. Yes.

8 Q. Did you ever ask a driver to stop working as a
9 driver because that driver was not able to deliver his
10 meal by 5:00 a.m.?

11 A. Yes.

12 Q. How many times did that happen?

13 A. How many times?

14 Q. Did you have to ask a driver to stop working
15 with Late Night --

16 A. To terminate their contract?

17 Q. That is correct.

18 A. I don't know how many times.

19 Q. It did happen, however?

20 A. Yes.

21 Q. It did happen because they were not able to
22 complete their deliveries by 5:00 a.m.?

23 MR. POLLACK: Objection.

24 A. That probably might have been one of the
25 circumstances. I do not remember.

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1 5:00 a.m.?

2 MR. POLLACK: Objection.

3 A. I recall talking to drivers about delivering
4 after 5:00 a.m.

5 Q. What would happen if a driver was delivering
6 meals after 5:00 a.m.?

7 A. That would depend on if we had a complaint from
8 the client or not.

9 Q. If you had a complaint from a customer, what
10 would happen if it was determined that a driver had,
11 in fact, delivered a meal after 5:00 a.m.?

12 A. Then it would depend if they actually got the
13 meals or they didn't.

14 Q. If they got the meals, but they were delivered
15 after 5:00 a.m., how would you deal with that
16 situation?

17 A. Then I would let the driver know that the
18 customer complained, and under contract they are
19 supposed to deliver by 5:00 a.m.

20 Q. Would the drivers be penalized financially?

21 A. No.

22 Q. If a driver had difficulty consistently
23 completing his deliveries by 5:00 a.m., would that be
24 a factor that you might take into account in deciding
25 to change the driver's route?

147

1 Q. Now, I want to go back to the driver meetings
2 that you held. Where did these meetings take place?

3 A. Where?

4 Q. Yes.

5 A. In the facility.

6 Q. Was there a room at Baltic Street that you
7 would use for the driver meetings?

8 A. Sometimes. Sometimes out in the packing area.
9 It depends.

10 Q. Now, Mr. Hussain, do you have an understanding
11 of what the lawsuit you are being deposed in today is
12 about?

13 A. No.

14 Q. Do you know what claims have been made in this
15 lawsuit?

16 A. No.

17 Q. Do you have any understanding that this lawsuit
18 is one in which certain former drivers are seeking
19 monetary relief?

20 A. Yes.

21 Q. How do you know that?

22 A. By the papers that were served.

23 Q. Do you recall being served with papers?

24 A. Yes.

25 Q. Do you recall when that happened?

149

1 A. No.

2 Q. Can you describe what happened the day you were
3 served with the papers?

4 A. I wasn't physically there. Someone else
5 accepted the papers on my behalf.

6 Q. When you got to work after that, did someone
7 bring those papers to your attention?

8 A. I think so, yes.

9 Q. Do you recall who that was?

10 A. No.

11 Q. Did they tell you what had been served?

12 A. No.

13 Q. Did they show you what had been served?

14 A. I think so. I don't know if somebody was
15 actually served on my behalf in the office or if it
16 came to me in the mail. So I am not sure how I got
17 the paper, but I did get them.

18 Q. Did you read them when you got them?

19 A. I tried to read what I could and tried to
20 understand what I could.

21 Q. Did you acquire an understanding based on
22 reading the papers as to what the lawsuit was about?

23 A. Not really.

24 Q. Did you have any reason to believe that this
25 lawsuit was going to be filed before you were served

150

1 Q. Was that person a driver?

2 A. Yes.

3 Q. Obviously, if you are not going to tell me,
4 there is nothing I can do about that today.

5 A. I am sorry.

6 Q. Was this person a driver?

7 A. Yes.

8 MR. POLLACK: Objection.

9 Q. Do you recall the conversation?

10 A. Not the specifics, but I recall the
11 conversation, yes.

12 Q. So this driver came to you and told you that he
13 had heard something about a possible lawsuit?

14 A. Yes.

15 Q. And what do you recall him telling you?

16 A. She did not want to be involved, and she did
17 not want to be pressured into it. And she felt like
18 she was being pressured.

19 Q. Did she tell you what type of lawsuit people
20 were considering filing?

21 A. No.

22 Q. Did she tell you that it was a lawsuit against
23 Late Night?

24 A. Against the company, yes.

25 Q. Did she tell you that she was being asked to

152

1 with papers?

2 MR. POLLACK: Objection.

3 A. I don't understand the question.

4 Q. Had anyone told you that some of the drivers
5 were thinking about filing a lawsuit against Late
6 Night?

7 A. Yes.

8 Q. When did you first hear that?

9 A. I don't know the exact date or time.

10 Q. What did you first hear?

11 A. I heard that drivers were trying to recruit
12 other drivers to join them in a lawsuit.

13 Q. Do you recall who told you that?

14 A. Yes.

15 Q. Who told you that?

16 A. I would rather not say.

17 Q. I understand you would rather not say, but I
18 have to ask the question anyway. If you refuse to
19 answer, it will be up to the court to determine
20 whether you should answer the question.

21 A. I would rather wait until the court determines
22 that, because whoever told me that, told me in
23 confidence.

24 Q. So someone told you?

25 A. Yes.

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1 join the lawsuit?

2 A. Yes.

3 Q. She told you that she didn't want to be a part
4 of it; is that correct? Is that your testimony?

5 MR. POLLACK: Objection.

6 A. She didn't use the word "asked." So she wasn't
7 being asked, according to her.

8 Q. Correct me, if I am mistaken. You testified
9 that she felt she was being pressured to participate
10 in a lawsuit?

11 A. Yes. She wasn't being asked. She was being
12 pressured.

13 Q. Did she explain how she was being pressured to
14 participate in a lawsuit?

15 A. She just said that they were approaching her
16 multiple times.

17 Q. When she said "they," did she identify who they
18 were?

19 A. Yes.

20 Q. Who were those individuals?

21 A. Fernando Hernandez.

22 Q. Anybody else?

23 A. That was the only name she gave me.

24 Q. Did you report this conversation to anyone?

25 A. Not to my knowledge. I don't recall reporting

153

1 it to anyone.

2 Q. Did you tell anyone at Fresh Diet about this

3 conversation?

4 A. Not that I recall.

5 Q. What did you tell her when she told you this

6 information?

7 A. He told her that I would talk to him about not

8 harassing her.

9 Q. You told this lady that you would speak to

10 Fernando about not harassing her?

11 A. Yes.

12 Q. Did you do that?

13 A. Yes.

14 Q. Do you recall doing that?

15 A. Yes.

16 Q. What do you recall about that conversation?

17 A. I recall talking to him and telling him to stop

18 bothering the drivers about the lawsuit. I don't

19 recall the specific words I used.

20 Q. Did you tell him that he shouldn't talk to

21 other drivers about a possible lawsuit?

22 A. I told him that he shouldn't be harassing

23 drivers if they didn't want to be involved. Something

24 to that effect.

25 Q. Do you recall what Mr. Hernandez told you at

154

1 Q. And you knew he worked as a driver?

2 A. Yes.

3 Q. Did the two of you get along?

4 A. Yes.

5 Q. Had you had any problems with his performance

6 up until that time?

7 MR. POLLACK: Objection.

8 A. He had some questionable issues.

9 Q. What types of issues did he have?

10 A. Are you looking for a specific?

11 Q. I will ask a different question. Was he making

12 his deliveries in a timely manner?

13 MR. POLLACK: Objection.

14 A. Sometimes.

15 Q. Did he have a problem with missed deliveries?

16 MR. POLLACK: Objection.

17 A. Sometimes.

18 Q. Did he have a problem with late deliveries?

19 MR. POLLACK: Objection.

20 A. Sometimes.

21 Q. Had you ever imposed a financial penalty on him

22 for late or missed deliveries?

23 A. If there was a missed delivery, I don't recall,

24 but I might have.

25 Q. But you don't recall specifically either way?

156

1 that time?

2 A. No. He probably just feigned ignorance. It

3 was kind of a "I don't know what you are talking

4 about," response, I think.

5 Q. Is that the only conversation you had with

6 Mr. Hernandez about the lawsuit?

7 A. As far as I remember, yes.

8 Q. Besides Mr. Hernandez, was there anyone else

9 that this person indicated was talking about a

10 lawsuit?

11 A. Not that I remember.

12 Q. When you said "they," it was just

13 Mr. Hernandez?

14 A. Yes.

15 Q. Who was Mr. Hernandez?

16 MR. POLLACK: Objection.

17 A. He was a delivery driver.

18 Q. At the time that this lady approached you with

19 this information, what was your relationship with

20 Mr. Hernandez like?

21 A. There was no relationship. I don't understand

22 the question.

23 Q. Well, he worked as a driver?

24 MR. POLLACK: Objection.

25 A. Yes.

155

1 A. No.

2 Q. Was Mr. Hernandez one of your better drivers?

3 MR. POLLACK: Objection.

4 A. Can you rephrase the question. I don't know

5 how to answer that.

6 Q. It was your responsibility to try to make sure

7 meals were being delivered on time and by 5:00 a.m.,

8 and everyone that needed to get a meal got his meal?

9 A. Yes.

10 Q. In attempting to meet that responsibility, you

11 had to determine how drivers were performing?

12 MR. POLLACK: Objection.

13 Q. Is that correct?

14 A. Yes.

15 Q. Assessing drivers' performance was part of your

16 job, as far as determining whether they were

17 delivering the meals?

18 MR. POLLACK: Objection. It is not a question.

19 A. It is not assessing driver performance. It

20 would be if we received complaints from their routes.

21 Q. It would be assessing whether or not meals were

22 being delivered on time properly and by 5:00 a.m.?

23 MR. POLLACK: Objection.

24 A. Yes.

25 Q. My question is: was Mr. Hernandez someone who

157

1 appeared to be having difficulty meeting those
2 objectives?

3 MR. POLLACK: Objection.

4 A. He had difficulties just like every other
5 driver at certain times. So it wasn't anything
6 extraordinary for him.

7 Q. So you didn't think he had extraordinary
8 problems meeting the delivery expectations?

9 A. Not usually, no.

10 Q. You weren't planning to terminate
11 Mr. Hernandez's contract, were you?

12 MR. POLLACK: Objection.

13 A. No.

14 Q. Were you surprised when this lady told you this
15 information?

16 MR. POLLACK: Objection.

17 A. Yes.

18 Q. Prior to this discussion with this woman, did
19 you have any other reason to believe that anyone was
20 considering filing a lawsuit against Late Night or
21 Fresh Diet?

22 A. No.

23 Q. This lady explained to you what Mr. Hernandez
24 was going to be seeking in the lawsuit?

25 MR. POLLACK: Objection.

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1 this discussion with Mr. Hernandez and the time the
2 lawsuit actually came in?

3 MR. POLLACK: Objection.

4 A. I can't be specific with the time.

5 Q. Was it a month?

6 A. Maybe more.

7 Q. Maybe more. Do you recall ultimately receiving
8 a lawsuit?

9 MR. POLLACK: Objection.

10 A. I am sorry?

11 Q. You recall ultimately receiving papers in
12 connection with a lawsuit?

13 MR. POLLACK: Objection.

14 A. Yes.

15 Q. Do you recall seeing the names of the
16 Plaintiffs in the lawsuit on the papers you received?

17 A. Yes.

18 Q. Do you recall whose names they were?

19 A. No.

20 Q. Do you recall the names of anyone who was on
21 the lawsuit?

22 A. Fernando, Kenneth Chow, Teresa Jackson, Bryant
23 White. That is all I remember.

24 Q. Do you remember Juany Guzman's name being on
25 the lawsuit?

160

1 A. No.

2 Q. Did you hear any other reference to a possible
3 lawsuit prior to the time the company was served?

4 MR. POLLACK: Objection.

5 A. Not that I recall, no.

6 Q. Do you recall speaking with any other driver
7 besides Mr. Hernandez and this lady about this issue
8 prior to the time the company was served?

9 MR. POLLACK: Objection.

10 A. Not that I recall.

11 Q. Do you recall asking any other drivers whether
12 they had been asked to participate in a lawsuit?

13 A. Not that I recall.

14 Q. Did you discourage any drivers to not
15 participate in a lawsuit against the company?

16 A. If I had known about it, I would not discourage
17 anybody.

18 Q. Well, you did know about it, isn't that
19 correct?

20 A. I didn't know about it. It was a rumor. It
21 wasn't substantial. It was hearsay more or less.

22 Q. You knew of the woman's complaint to you?

23 MR. POLLACK: Objection.

24 A. Yes.

25 Q. How much time passed between the time you had

159

1 A. Now I do.

2 Q. Once you saw this paper or these papers, how
3 did you respond?

4 MR. POLLACK: Objection.

5 A. I don't understand the question.

6 Q. What did you do after you received the lawsuit?

7 A. Nothing, to my knowledge. To my recollection,
8 nothing.

9 Q. Did you contact anyone at The Fresh Diet?

10 MR. POLLACK: Objection.

11 A. Yes.

12 Q. Who did you contact?

13 A. Judah Schloss.

14 Q. Do you recall telling him that you had received
15 the lawsuit?

16 A. Yes.

17 Q. Do you recall what he told you?

18 A. No.

19 Q. Did he tell you that the company would be
20 handling the lawsuit?

21 MR. POLLACK: Objection.

22 A. I do not remember what he told me.

23 Q. Did you believe at the time that you had any
24 responsibility to respond to the lawsuit?

25 MR. POLLACK: Objection.

161

1 A. I don't understand the question.
 2 Q. Did you see that you yourself were named
 3 individually in the lawsuit?
 4 A. Yes.
 5 Q. Did you understand that you were named as a
 6 defendant in the lawsuit?
 7 A. Yes.
 8 Q. Did you do anything in response to seeing your
 9 name listed as a defendant in the lawsuit?
 10 MR. POLLACK: Objection.
 11 A. Yes. I spoke to Judah.
 12 Q. What did you ask or what did you tell Judah?
 13 A. I do not remember the conversation we had.
 14 Q. Did Judah tell you that the company would be
 15 defending the lawsuit?
 16 MR. POLLACK: Objection.
 17 A. I don't remember what he told me.
 18 Q. Did you ever have to hire a lawyer to defend
 19 you in the lawsuit?
 20 A. No.
 21 Q. Did you ever think that you needed to hire a
 22 lawyer to defend you in the lawsuit?
 23 MR. POLLACK: Objection.
 24 A. What I thought is irrelevant. It is what
 25 happened. I didn't have to.

162

1 A. No.
 2 Q. But you had no discretion to change that?
 3 MR. POLLACK: Objection.
 4 A. No.
 5 Q. Do you yourself have an understanding of the
 6 differences between employees and independent
 7 contractors?
 8 A. I am sure not as extensive as you.
 9 Q. But that is not my question. I just want to
 10 know what your understanding is. Before you answer, I
 11 just want to remind you that at the beginning of the
 12 deposition I told you that the deposition is not a
 13 test. There is no right answer or wrong answer. I am
 14 just asking for your understanding.
 15 A. To my understanding, the difference is to do
 16 with the taxes. Independent contractors file their
 17 own taxes, and they have control over their own
 18 schedules, their jobs.
 19 Q. Were you done?
 20 A. Yes.
 21 Q. When you say they have control over their own
 22 jobs, what do you mean by that?
 23 A. That means that they don't work under direct
 24 supervision. They are not working with schedules or
 25 time clocks.

164

1 Q. After you received the lawsuit papers, did you
 2 speak to anyone else about the lawsuit?
 3 A. I am sure I did. I don't remember who.
 4 Q. Do you recall speaking to any of the drivers
 5 about the lawsuit?
 6 A. I don't think I did.
 7 Q. Do you remember speaking to any of the drivers
 8 who had been named in the lawsuit about the lawsuit?
 9 MR. POLLACK: Objection.
 10 A. Not to my recollection.
 11 Q. Do you recall discussing it with Juany Guzman?
 12 A. Not to my recollection.
 13 (Whereupon, from 2:36 p.m. to 2:44 p.m. a
 14 recess was taken.)
 15 BY MR. ANDREWS:
 16 Q. Mr. Hussain, you weren't the person who made
 17 the decision as to whether the drivers would be
 18 classified as independent contractors, were you?
 19 MR. POLLACK: Objection.
 20 A. No.
 21 Q. That was something that you were told?
 22 MR. POLLACK: Objection.
 23 A. Yes.
 24 Q. You do not recall who specifically told you
 25 that?

163

1 Q. Have you yourself been an independent
 2 contractor in the past?
 3 MR. POLLACK: Objection.
 4 A. Yes.
 5 Q. Have you been an independent contractor for
 6 Late Night?
 7 MR. POLLACK: Objection.
 8 A. Yes.
 9 Q. When were you an independent contractor for
 10 Late Night?
 11 MR. POLLACK: Objection.
 12 A. I do not remember the dates or the times.
 13 Q. When you started working with Late Night, were
 14 you an independent contractor?
 15 MR. POLLACK: Objection.
 16 A. Yes.
 17 Q. Did you also work as an employee for Late
 18 Night?
 19 MR. POLLACK: Objection.
 20 A. No.
 21 Q. So all of the work you did with Late Night was
 22 as an independent contractor?
 23 MR. POLLACK: Objection.
 24 A. Yes. To my knowledge, yes.
 25 Q. But now for The Fresh Diet, do you consider

165

1 yourself an employee?

2 MR. POLLACK: Objection.

3 A. Yes.

4 Q. That is a change that occurred as of September
5 1st?

6 MR. POLLACK: Objection.

7 A. Yes.

8 MR. ANDREWS: I will introduce as Exhibit 1 to
9 Mr. Hussain's deposition a document that was
10 previously introduced or filed by the Defendants in
11 this litigation.

12 (Whereupon, Affidavit of Syed Hussain in
13 Opposition to Plaintiffs' Motion for Injunctive Relief
14 was marked as Hussain's Exhibit 1 for identification,
15 this date.)

16 BY MR. ANDREWS:

17 Q. Mr. Hussain, you have been shown what has been
18 marked as Exhibit 1, and I will just ask you to take a
19 couple of minutes and look at it. My first question
20 is whether you have seen this document previously?

21 A. Yes.

22 Q. Can you identify what this document is?

23 A. It's an affidavit.

24 Q. Is it your affidavit?

25 A. Yes.

166

1 A. Yes.

2 Q. So in this deposition today, when you were
3 talking about the term "regional manager," it also
4 means delivery manager?

5 A. Yes.

6 Q. Is there any reason why you would have used the
7 term "delivery manager" rather than regional manager?

8 A. No. No particular reason.

9 Q. Now, I want to direct your attention to
10 paragraph 5 on the second page: "My Duties with Late
11 Night Express." Paragraph 5 says: "I have been
12 employed by Late Night Express since 2007." Is that
13 the year you recall coming to Late Night?

14 A. I am sure that is correct.

15 Q. Paragraph 6 says: "In that capacity, my duties
16 include overseeing deliveries in the Tri-State area,
17 hiring drivers, creating routes, and assigning drivers
18 to routes and new clients." Do you see that
19 paragraph, Mr. Hussain?

20 A. Yes.

21 Q. Do you agree that that is an accurate
22 description of your duties with Late Night Express?

23 A. Yes.

24 Q. That would have been true up to September 1st
25 of this year?

168

1 Q. Do you see that on the seventh page of the
2 affidavit it is signed?

3 A. Yes.

4 Q. Is that your signature?

5 A. Yes.

6 Q. Do you see it was signed on or about July 30,
7 2012?

8 A. Yes.

9 Q. Do you recall signing this affidavit at or
10 around that time?

11 A. I am sure I did. I don't recall.

12 Q. Do you recall how this affidavit was prepared?

13 MR. POLLACK: Objection.

14 A. No.

15 Q. Did you prepare this affidavit?

16 MR. POLLACK: Objection.

17 A. I do not remember.

18 Q. I would like to focus your attention on the
19 first page of the affidavit, paragraph 1, where it
20 says: "Syed Hussain, being duly sworn, does hereby
21 depose and say: I am the Delivery Manager for Late
22 Night Express, Inc." Do you see that, sir?

23 A. Yes.

24 Q. Is delivery manager the same thing as regional
25 manager?

167

1 A. Yes.

2 Q. It would have been true as of the date you
3 became regional manager or delivery manager?

4 A. Yes.

5 Q. You do not recall what that date was though?

6 A. No.

7 Q. Were you regional manager or delivery manager
8 for more than two years?

9 A. Yes.

10 Q. Was it more than three years?

11 A. I am not sure.

12 Q. Paragraph 7 says: "I have worked with Guzman
13 since his hire on or about February 1, 2012.
14 Similarly, I have known Hernandez since his hire in or
15 about April 2010." Do you see that?

16 A. Yes.

17 Q. Did you hire Mr. Hernandez in or about April
18 2010?

19 A. I guess so, yes.

20 Q. Do you recall hiring Mr. Hernandez?

21 A. No.

22 Q. Do you recall hiring Mr. Guzman in 2012?

23 A. Yes.

24 Q. Paragraph 9 says: "Until I was informed that
25 the company had been served with a copy of a

169

1 complaint, I had no idea whatsoever that a few
2 employees were considering such an action." Do you
3 see that paragraph, sir?

4 A. Yes.

5 Q. Do you agree with that statement?

6 A. Yes.

7 Q. I want to direct your attention to paragraph
8 22, which states: "Thereafter, Guzman called out of
9 work on June 29 and June 30, 2012. Since then, Guzman
10 has been a 'no call no show' -- in other words, he has
11 simply failed to report to work." Do you see that,
12 sir?

13 A. Yes.

14 Q. Directing your attention to paragraph 3 on page
15 6: The paragraph underneath "Conclusion." "The Fresh
16 Diet and Late Night Express have taken no action
17 whatsoever against Hernandez or Guzman that is
18 retaliatory. Both Plaintiffs simply have failed to
19 report to work and/or make themselves available for
20 routes which they have been assigned." Do you see
21 that paragraph, sir?

22 A. Yes.

23 Q. Would you agree with that paragraph today?

24 A. Yes.

25 Q. Are drivers assigned to routes?

170

1 A. Yes.

2 Q. Now, each day's manifest was given to the
3 driver that day?

4 A. Yes.

5 Q. So only one manifest at a time was given out to
6 a driver?

7 MR. POLLACK: Objection.

8 A. I don't understand the question. If they were
9 covering more than one route, they would get two
10 manifests.

11 Q. Well, I am talking about route per day?

12 MR. POLLACK: Objection.

13 A. Could you --

14 Q. I will rephrase the question. You would not
15 give a driver manifests for several days at one time,
16 would you?

17 A. No.

18 Q. That was never done, to your knowledge?

19 A. No.

20 Q. So each day a driver would receive one or more
21 new manifests just for that day?

22 A. Yes.

23 Q. Now, apart from the manifests and the reports
24 you had to turn in --

25 A. Yes.

172

1 A. Like I said, if they become comfortable with
2 the routes, then those become their routes.

3 Q. Those become their assignments?

4 MR. POLLACK: Objection.

5 Q. Would that be a fair statement?

6 A. I would not say assignments. I would say that
7 those are the routes that they are -- how do I word
8 this? That is the understanding that we have, that
9 that is the routes that they would be doing going
10 forward.

11 Q. It was a mutual understanding between you and
12 each driver?

13 A. Yes.

14 Q. Apart from the manifests, were there written
15 schedules for drivers?

16 MR. POLLACK: Objection.

17 A. No.

18 Q. So the manifests would have been the only
19 documents indicating which drivers were making which
20 deliveries?

21 MR. POLLACK: Objection.

22 A. No. My report would say it as well.

23 Q. Your report would say it as well?

24 A. Yes.

25 Q. This report would be an electronic report?

171

1 Q. -- were drivers' assignments or routes
2 documented anywhere else, to your knowledge?

3 A. Not that I can recall right now, no.

4 Q. So you don't recall any weekly or monthly
5 schedules that existed?

6 MR. POLLACK: Objection.

7 A. No monthly. We didn't have any weekly
8 schedules. We had a paper with the drivers' names and
9 their routes, and that was to stagger the way they
10 came in and loaded their cars. Because we couldn't
11 have everybody in such a small space at the same time.

12 Q. Who prepared this paper?

13 A. I did.

14 Q. How often was this paper updated?

15 A. It wasn't updated. It was just a one time
16 thing.

17 Q. You only created it once?

18 A. Yes.

19 Q. It was never changed?

20 A. To my knowledge, no. Unless there was a change
21 in drivers.

22 Q. If there was a change in drivers, would a new
23 paper be created?

24 A. I would assume so, yes.

25 Q. Do you recall creating new papers when drivers

173

1 changed?

2 A. No. But I am sure I did.

3 Q. Where was this paper hanging?

4 A. It was by the area where the bags were.

5 Q. And did this paper have a title or a name?

6 A. Not that I know.

7 Q. What did this paper look like, to your
8 recollection?

9 A. It just had the drivers, the routes, and the
10 order in which they should be coming in to get their
11 bags.

12 Q. Do you recall having any discussions with
13 Mr. Hernandez about changing his route?

14 A. Yes.

15 Q. What discussions do you recall with
16 Mr. Hernandez about changing his route?

17 A. A lot of discussions. Is there a particular
18 one you want to talk about?

19 Q. I will ask the questions as best I can. How
20 many discussions did you have with Mr. Hernandez about
21 changing his route?

22 A. Maybe two or three.

23 Q. Do you recall why you and Mr. Hernandez were
24 having discussions about changing his route?

25 A. He didn't like his route.

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1 truthful when he reported that he had picked up a bag
2 from that location?

3 A. Yes.

4 Q. Was that just one instance or was there more
5 than one instance?

6 A. That was the instance -- that was the one
7 instance where I found proof, but it wasn't the first
8 time it happened.

9 Q. You thought there might have been other
10 instances where that happened?

11 A. Yes.

12 Q. When you found out about this specific
13 instance, what was your response to that?

14 A. I adjusted the route so that there would be no
15 more double deliveries in the same building on his
16 route to eliminate that issue.

17 Q. Did you reprimand him about making a false
18 representation to you?

19 MR. POLLACK: Objection.

20 A. I spoke to him about it.

21 Q. Do you recall what you told him?

22 A. I told him that his route would be adjusted due
23 to the information that I had received.

24 Q. Did you tell him that you thought that he had
25 made a false representation to you?

176

1 Q. So he had complained to you that he didn't like
2 his route?

3 A. Yes.

4 Q. What about his route did he not like?

5 A. I think the first one was going too far uptown,
6 if I recall. I could be wrong. It might have been a
7 downtown one and he just couldn't deal with the Wall
8 Street financial area. That might have been it. One
9 of the other instances was when he was working in
10 midtown and the west side, and it was commercial
11 parking, and he had trouble parking his car. Another
12 instance was when he was doing a route and giving me
13 more stops than he had actually done.

14 Q. Could you explain what you mean by that?

15 A. He was making deliveries in buildings and
16 adding that he was doing bag pick ups in those
17 buildings as well, which we pay the drivers for, which
18 turned out to be a false claim.

19 Q. How did you determine that it was a false
20 claim?

21 A. Because he told about the building and the
22 client, and I called the client to determine if the
23 client had left the bag out for him to pick up. The
24 client was actually out of town.

25 Q. So you determined that he was not being

175

1 A. Yes.

2 Q. Were you angry about that at the time?

3 MR. POLLACK: Objection.

4 A. I do not remember.

5 Q. Do you remember what he said to you when you
6 told him that?

7 A. No.

8 Q. Did he deny making the false representation?

9 A. I would imagine so. I am not sure one hundred
10 percent.

11 Q. Do you recall Mr. Hernandez ever complaining to
12 you about your cutting his route?

13 A. Yes. That would probably be because of what
14 had happened.

15 Q. You recall his protesting the fact that you had
16 made a decision to cut his route?

17 A. I don't recall it, but if he did, it would
18 probably be in response to that.

19 Q. Do you recall whether drivers ever attempted to
20 ask other drivers to make deliveries for them?

21 A. Yes. I am sure it has happened. I don't
22 recall specifics.

23 Q. Do you recall any specific instance where that
24 happened?

25 A. No.

177

1 Q. If a driver was going to ask another driver to
2 make deliveries for him, did you want that driver to
3 tell you about it?

4 A. I wouldn't need to know about it.

5 Q. You would not need to know about it?

6 A. No.

7 Q. If you found out that one driver had, in fact,
8 asked another driver to make his deliveries for him,
9 and the other driver was, in fact, the other driver
10 making the deliveries for him, would you speak to
11 either driver about that?

12 A. Not unless there was a delivery issue.

13 Q. So if the deliveries had been properly made,
14 you would not even discuss that with either driver?

15 A. I wouldn't see it necessary to.

16 Q. Do you recall drivers asking you whether they
17 could switch assignments with other drivers?

18 MR. POLLACK: Objection.

19 A. No. I don't recall them asking me.

20 Q. Did you ever discourage a driver from switching
21 routes with another driver?

22 A. Not to my knowledge.

23 Q. If a driver had gotten someone else to make his
24 deliveries for him, was that driver still responsible
25 for the deliveries that he had been assigned to make?

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1 A. No. Mr. Chow would be responsible for it.

2 MR. ANDREWS: I would like to introduce a
3 document as Hussain's Exhibit 2.

4 (Whereupon, Affidavit in Opposition to
5 Plaintiffs' Motion for Class Certification was marked
6 as Hussain's Exhibit 2 for identification, this date.)
7 BY MR. ANDREWS:

8 Q. My first question is whether you recall having
9 seen this document previously?

10 A. Yes.

11 Q. Can you identify what this document is?

12 MR. POLLACK: Objection.

13 A. An affidavit.

14 Q. Is it your affidavit?

15 A. Yes.

16 Q. I want to direct your attention to the fifth
17 page.

18 A. Yes.

19 Q. Do you see the signature on the fifth page?

20 A. Yes.

21 Q. Is that your signature?

22 A. Yes.

23 Q. Do you see that there is a notarization of your
24 signature from June 13, 2013?

25 A. Yes.

180

1 MR. POLLACK: Objection.

2 A. No. I don't think so.

3 Q. If Mr. Hernandez was doing a particular route
4 and a complaint had come in that a delivery had not
5 been made or had been made late, and you investigated
6 and you determined that, in fact, Mr. Hernandez had
7 given the meal to Mr. Chow and asked him to make the
8 delivery and for one reason or another the delivery
9 was not made, would you speak to Mr. Hernandez about
10 that?

11 MR. POLLACK: Objection.

12 A. No.

13 Q. No?

14 A. It would be Mr. Chow's responsibility.

15 Q. Even though you had not assigned Mr. Chow to
16 make that delivery?

17 MR. POLLACK: Objection.

18 A. Yes.

19 Q. So if Mr. Hernandez had been assigned a route,
20 and then without consulting you asked Mr. Chow to make
21 those deliveries and the deliveries had not been made
22 and a client or clients called to complain that the
23 deliveries had not been made, you would not feel that
24 Mr. Hernandez was responsible for that problem?

25 MR. POLLACK: Objection.

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1 Q. Do you recall signing this affidavit on or
2 about June 13, 2013?

3 A. I don't recall it, but I am sure I did.

4 Q. Do you know who prepared this affidavit?

5 MR. POLLACK: Objection.

6 A. No.

7 Q. Did you prepare this affidavit?

8 A. No.

9 Q. I would like to direct your attention to
10 paragraph 5 on the second page: "The drivers would
11 pick up meal bags from The Fresh Diet's facility in
12 Brooklyn. The earliest time the meal bags are ready
13 to go out for delivery in the Tri-State area is 7:00
14 p.m. However, for those meals being delivered on New
15 York City routes, the meals do not go out until 9:00
16 p.m." Do you see that paragraph, Mr. Hussain?

17 A. Yes.

18 Q. Do you agree that that paragraph is an accurate
19 statement?

20 A. I am sure it was at the time.

21 Q. Do you have any reason to believe it is no
22 longer accurate?

23 A. It is probably no longer accurate, because the
24 time of the meals being prepared have changed.

25 Q. In what way have they changed?

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1 A. They are being prepared earlier.
 2 Q. This affidavit is from June 2013. Do you
 3 recall when the change took place?
 4 A. Very recently.
 5 Q. Why was the change made?
 6 A. Why was the change made, I am not sure.
 7 Q. Was the change made because drivers were unable
 8 to complete their routes before 5:00 a.m.?
 9 A. No.
 10 Q. So as of June 2013, it is your testimony that
 11 this statement was accurate?
 12 A. Yes.
 13 Q. It says, again: "The earliest time the meal
 14 bags are ready to go out for delivery in the Tri-State
 15 area is 7:00 p.m."?
 16 A. Yes.
 17 Q. Do you recall whether drivers would arrive to
 18 the facility before 7:00 p.m.?
 19 A. Yes. Sometimes they would.
 20 Q. If they arrived before 7:00 p.m., did they have
 21 any functions to perform before 7:00 p.m.?
 22 A. No.
 23 Q. So if they arrived before 7:00 p.m., they would
 24 just wait for the meals to be ready?
 25 A. Unless they were already ready, yes.

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1 family members to provide the deliveries on their
 2 behalf. Again, this was of no concern to Late Night
 3 so long as the meals were delivered." Do you see that
 4 paragraph, sir?
 5 A. Yes.
 6 Q. As of June 2013 would you agree that this is an
 7 accurate description of your understanding?
 8 A. Yes.
 9 Q. What is the basis for your understanding that
 10 some of the drivers even took their family members
 11 with them during deliveries?
 12 A. Are you asking me how I know that?
 13 Q. How do you know that, yes.
 14 A. Because I have seen them.
 15 Q. You have seen drivers with family members?
 16 A. Yes.
 17 Q. The same sentence concludes: "or gave certain
 18 meals to family members to provide the deliveries on
 19 their behalf." Do you see that?
 20 A. Yes.
 21 Q. How did you know that to be the case?
 22 A. Because I have seen that as well.
 23 Q. How have you seen it?
 24 A. I will give you an example. If a driver comes
 25 in and he has 20 bags to deliver, I have seen him

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1 Q. Were meals sometimes ready earlier than 7:00
 2 p.m.?
 3 A. They might be sometimes, yes.
 4 Q. Would you ever tell a driver that the meals
 5 were ready before 7:00 p.m.?
 6 A. Not necessarily, no.
 7 Q. I am not asking whether it was necessarily
 8 true. I am asking would you ever tell a driver that
 9 meals were ready prior to 7:00 p.m.?
 10 A. Only if they asked, and if it was.
 11 Q. If drivers got there before the meals were
 12 ready, it is your testimony that they would have no
 13 function to perform?
 14 MR. POLLACK: Objection.
 15 A. No.
 16 Q. They would have no function?
 17 A. They would have no function.
 18 Q. So they would just wait until the meals were
 19 ready?
 20 MR. POLLACK: Objection.
 21 A. Yes.
 22 Q. I want to direct your attention to paragraph 9.
 23 Paragraph 9 says: "It is my understanding that some
 24 of the drivers even took their family members with
 25 them during deliveries, or gave certain meals to

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1 bring his brother in and then give him 5 or 10 bags to
 2 deliver on his behalf while he delivers the other 5 or
 3 10.
 4 Q. That would be his brother in a separate car?
 5 A. Yes.
 6 Q. So you would see drivers bring people in other
 7 cars?
 8 A. Yes.
 9 Q. And give meals to them?
 10 A. Yes.
 11 Q. I would like to direct your attention to
 12 Exhibit 1 to the affidavit, which starts with Bates
 13 number FD000048, which is "Late Night Courier
 14 Services, Inc., Independent Contractor Agreement." Do
 15 you see that?
 16 A. Yes.
 17 Q. Would this be the type of document that you
 18 would ask new drivers to sign?
 19 A. Yes.
 20 Q. But again, just to be clear, you did not
 21 prepare this type of document yourself?
 22 A. That is correct.
 23 Q. It was given to you by other people, and you
 24 were asked to give it to drivers to sign?
 25 MR. POLLACK: Objection.

185

1 A. Yes.

2 Q. I would like to direct your attention several

3 pages into that document. There is a "Schedule A.

4 Duties, Terms, and Compensation."

5 A. Yes.

6 Q. Do you see that page, which is Bates numbered

7 FD000052?

8 A. Yes.

9 Q. Do you see at the bottom, it says: "Fees:

10 Contractor will be fined \$25.00 for at fault, missed

11 deliveries, and other specific assignment(s)

12 instructed by the Regional Delivery Manager. If

13 contractor is unable to perform the assigned route,

14 contractor must provide _____ hours notice (varies by

15 region). Failure to comply will result in a penalty

16 fee of 50% of that day's route (based on miles and

17 stops). All fees will be deducted from Invoice

18 (payment of service)." Do you see that, Mr. Hussain?

19 A. Yes.

20 Q. Is this the fee or penalty schedule that you

21 testified about earlier today?

22 A. Yes. I suppose so.

23 Q. Again, this is not something that you developed

24 yourself?

25 MR. POLLACK: Objection.

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1 MR. POLLACK: Objection.

2 A. Yes.

3 Q. Is that Carlo Ricci?

4 A. Yes.

5 Q. Do you know Carlo Ricci?

6 A. Yes, I do.

7 Q. Have you worked with Carlo Ricci?

8 A. I mean, yes, but not as directly as I have

9 worked with Cesar Ricci.

10 Q. In what manner have you worked with Carlo

11 Ricci?

12 A. When we first moved to New Jersey, Carlo was

13 present there.

14 Q. Do you recall what Carlo was doing when the

15 company first moved to New Jersey?

16 A. No.

17 Q. Do you recall whether any drivers or former

18 drivers at Late Night ever filed claims for

19 unemployment insurance benefits?

20 MR. POLLACK: Objection.

21 A. Yes.

22 Q. How many times do you recall that happening?

23 MR. POLLACK: Objection.

24 A. Once.

25 Q. Do you recall who the driver was who filed the

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1 A. No.

2 Q. Now, you mentioned a gentleman named Cesar

3 Ricci earlier today?

4 MR. POLLACK: Objection.

5 A. Did I? I don't recall.

6 Q. Strike that. Do you know somebody named Cesar

7 Ricci?

8 A. Yes.

9 Q. Who is Cesar Ricci?

10 A. He works for The Fresh Diet. I don't know his

11 current position.

12 Q. Have you ever worked with Mr. Ricci?

13 A. Yes.

14 Q. Can you describe how you have worked with

15 Mr. Ricci in the past?

16 A. He was my manager.

17 Q. You reported to him?

18 A. Yes.

19 Q. During what period of time was he your manager?

20 A. I would say the last year -- the last two

21 years, up until September 1st.

22 Q. Up until September 1st?

23 A. Yes.

24 Q. Does he have a brother who also works for the

25 company?

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1 claim?

2 A. Juan Correa.

3 Q. That is the only instance that you recall?

4 A. Yes.

5 Q. Do you recall what the company's position was

6 with respect to that complaint?

7 MR. POLLACK: Objection.

8 A. No.

9 Q. Do you know whether the company challenged

10 Mr. Correa's claim in any way?

11 MR. POLLACK: Objection.

12 A. I don't know.

13 Q. Did you participate in responding to

14 Mr. Correa's claim?

15 MR. POLLACK: Objection.

16 A. No.

17 Q. Do you know how Mr. Correa's claim was

18 resolved?

19 A. No.

20 Q. Do you know of any instance where the company

21 has opposed a driver's claim on the grounds that the

22 driver was an independent contractor?

23 MR. POLLACK: Objection.

24 A. Not to my recollection.

25 Q. Is it fair to say that you have not been

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1 personally involved in any unemployment insurance
 2 claim filed by a driver for Late Night?
 3 A. That would be correct.
 4 Q. You have never had to appear at a hearing in
 5 connection with an unemployment insurance claim for
 6 Late Night?
 7 A. Not that I remember, no.
 8 Q. Apart from this specific lawsuit we are in now,
 9 do you recall any other claims or lawsuits brought
 10 against the company by any driver or former driver?
 11 MR. POLLACK: Objection.
 12 A. Yes.
 13 Q. What other lawsuits or claims do you recall?
 14 A. I can't specify, because I am not sure exactly
 15 what it was.
 16 Q. Can you just tell me what your understanding
 17 is? Again, it is not a test. I am just interested in
 18 what you understand.
 19 A. I think it was Bryant White, a worker's comp
 20 hearing. I am not sure if that is exactly what it
 21 was.
 22 Q. Bryant White was a former driver?
 23 A. Yes.
 24 Q. Again, I understand it is your understanding.
 25 It is your understanding that he may have brought a

190

1 MR. POLLACK: Objection.
 2 A. No.
 3 Q. Do you recall what happened to Mr. White's
 4 claim?
 5 A. No.
 6 Q. Do you know if the company was contesting
 7 Mr. White's claim?
 8 MR. POLLACK: Objection.
 9 A. I don't know.
 10 Q. Do you know a lady by the name of Ana Mateo?
 11 A. Yes.
 12 Q. Who is Ana Mateo?
 13 A. I don't know her position in the company.
 14 Q. Where does Ms. Mateo work?
 15 A. In New York.
 16 Q. At Baltic Street?
 17 A. Yes.
 18 Q. Have you worked with her directly at all?
 19 A. I don't understand the question. We don't work
 20 together. So I wouldn't say I worked with her
 21 directly.
 22 Q. You don't know what she does for the company?
 23 A. I don't know her title.
 24 Q. Do you know what her duties are for the
 25 company?

192

1 worker's compensation claim?
 2 MR. POLLACK: Objection.
 3 A. That is my understanding, yes.
 4 Q. Were you in any way involved in responding to
 5 that claim?
 6 MR. POLLACK: Objection.
 7 A. Yes.
 8 Q. What did you have to do in response to that
 9 claim?
 10 A. I had to -- I didn't end up doing anything. I
 11 went and appeared. They didn't really ask me any
 12 questions, so I didn't do anything in the end.
 13 Q. But you were available at a hearing?
 14 A. Yes.
 15 Q. So you recall there being a hearing on his
 16 claim?
 17 A. Yes.
 18 Q. Do you recall when you went to that hearing?
 19 A. No.
 20 Q. Had you prepared to testify at that hearing, if
 21 you were called to testify?
 22 MR. POLLACK: Objection.
 23 A. No.
 24 Q. Do you recall why you had been asked to be
 25 available for that hearing?

191

1 A. Not specifically.
 2 Q. Do you have a general understanding?
 3 A. I think she has bounced around from office
 4 manager to HR. I am not absolutely sure.
 5 Q. Currently in your new position as of September
 6 1st, do you have a HR person reporting to you?
 7 A. No.
 8 Q. Do you report to any HR staff?
 9 A. I haven't so far.
 10 Q. Now, we talked before about Ms. Sandy Ornelas.
 11 Do you recall that?
 12 A. Yes.
 13 Q. What was her role again, to your recollection?
 14 MR. POLLACK: Objection.
 15 A. I am not sure.
 16 Q. Is she with the company still?
 17 MR. POLLACK: Objection.
 18 A. No.
 19 Q. Do you know whether any drivers ever helped
 20 package the food prior to the food going out for
 21 delivery?
 22 A. Yes.
 23 Q. Is that, yes, you recall drivers helping
 24 package the food?
 25 A. Yes.

193

1 Q. Under what circumstances did drivers help
2 package the food?

3 A. If the kitchen was taking too long to pack.

4 Q. There were times that you recall where the
5 kitchen was taking too long to prepare the food?

6 A. Not specific times, but I remember it
7 happening, yes.

8 Q. You remember it being an issue?

9 A. Yes.

10 Q. What do you remember about those instances?

11 A. Just that the food was being packed late and
12 drivers were waiting.

13 Q. So drivers had already arrived at the facility
14 and were waiting to begin making deliveries and the
15 meals were not ready?

16 A. Yes.

17 Q. On those occasions what would the drivers do?

18 A. They would either wait or assist in packing the
19 bags.

20 Q. How many times do you remember that happening?

21 A. I can't specify how many times, but it happened
22 a few times.

23 Q. What was the earliest you recall in the day a
24 driver's showing up to the Baltic Street facility?

25 A. Maybe 3:00 or 4:00.

194

1 Q. Do you recall ever speaking to any drivers
2 about arriving at the facility too early in the day?

3 A. Not that I remember.

4 Q. Did you ever discourage drivers from coming to
5 the facility early in the day?

6 A. Not that I recall, no.

7 Q. When you were a regional manager, at what time
8 of day did you begin communicating with drivers for
9 that evening's deliveries?

10 MR. POLLACK: Objection.

11 A. I couldn't give you a specific answer on that.

12 Q. But the communications would start at some
13 point during the day?

14 MR. POLLACK: Objection.

15 A. I don't know. I don't know.

16 Q. But you do recall communicating with drivers
17 during the day about the evening's deliveries?

18 MR. POLLACK: Objection.

19 A. Not really. Like I said, the only time there
20 would be a communication is if the driver would
21 request it, or if the driver called or sent a text
22 message asking if the food was ready. That is how it
23 would usually go.

24 Q. How would you know which drivers were coming in
25 that evening?

196

1 Q. Do you know why a driver would show up that
2 early in the day?

3 A. Entirely up to them.

4 Q. Do you recall ever telling a driver that meals
5 were ready for him by 3:00 or 4:00 p.m.?

6 A. I am sure it must have happened, if the meals
7 were ready.

8 Q. So if meals were ready, you would have let
9 drivers know?

10 A. If they wanted me to let them know, then yes.

11 Q. So some drivers wanted you to let them know
12 when the meals would be ready?

13 A. Yes.

14 Q. Sometimes they were ready by 3:00 or 4:00?

15 A. Yes.

16 Q. In those instances, you would let those drivers
17 know that their meals were ready?

18 MR. POLLACK: Objection.

19 A. Yes.

20 Q. In certain instances drivers would come at 3:00
21 or 4:00?

22 A. Correct.

23 Q. Do you recall any drivers arriving before 3:00
24 in the afternoon?

25 A. Not to my knowledge.

195

1 MR. POLLACK: Objection.

2 A. I would take it that they were coming in until
3 they told me they weren't.

4 Q. I understand. You said you would take it that
5 they were coming in?

6 A. Yes.

7 Q. How would you know who you were expecting to
8 come in that evening?

9 A. Because the drivers had already been -- I don't
10 know how to explain it. But it was just an
11 understanding that the drivers were assigned to those
12 routes for those days for that week. Unless I heard
13 otherwise, that would just be the way it went.

14 Q. I understand. Do you recall, either before or
15 after this lawsuit was filed, ever being advised to
16 preserve any documents or records that you might have
17 pertaining to the lawsuit?

18 A. No.

19 Q. Have you done anything to preserve documents or
20 records that you might have had pertaining to this
21 lawsuit?

22 A. I submitted what I was asked to submit what I
23 had.

24 Q. But my question was: apart from that, have you
25 done anything else to preserve any documents or

197

1 records pertaining to this lawsuit?

2 A. No.

3 Q. Do you currently use a cellphone or Smartphone

4 in connection with your work?

5 A. Yes.

6 Q. How long have you had your current phone?

7 A. Maybe four months.

8 Q. Before that time, did you have another phone?

9 A. Yes.

10 Q. What type of phone did you have?

11 A. A Google G2.

12 Q. How long did you have that one for?

13 A. Maybe a few months.

14 Q. Did you have one before that one?

15 A. The same phone before that one.

16 Q. A Google G2 as well?

17 A. Yes.

18 Q. What happened to the prior Google G2?

19 A. I had three of them. They all had a defect

20 where they just turn off.

21 Q. Have you maintained the same cellphone number?

22 A. Yes.

23 Q. What is that cellphone number?

24 A. 646-436-3846.

25 Q. For how long have you maintained that number?

198

1 Q. Do you recall what those documents were?

2 A. Any text messages I had, manifests, documents.

3 I guess manifests and that kind of stuff, activity

4 reports.

5 Q. How did you go about collecting this

6 information?

7 A. Well, the manifests are stored in the computer.

8 Q. So it is not the manifests themselves. It is

9 the information from the manifests that are stored in

10 the computer?

11 A. Yes.

12 Q. The manifests themselves would have been

13 discarded after a week?

14 A. Correct.

15 Q. Do you recall searching for any other

16 documents?

17 A. No.

18 MR. ANDREWS: I am going to take a five-minute

19 break, and then I am going to try to wrap up.

20 (Whereupon, from 3:35 p.m. to 3:44 p.m. a

21 recess was taken.)

22 BY MR. ANDREWS:

23 Q. Mr. Hussain, do you recall whether any drivers

24 ever complained to you about their independent

25 contractor status?

200

1 A. I am not sure. It has been years.

2 Q. It has been several years?

3 A. Yes.

4 Q. The Google phones, and what is your current

5 phone?

6 A. HTC 1.

7 Q. The three Google phones that you had and the

8 HTC ones, are these phones that you would use in

9 connection with your work?

10 A. Yes.

11 Q. Would you have sent and received text messages

12 using these phones?

13 A. Yes.

14 Q. Would you have received and sent messages to

15 and from drivers using these phones?

16 A. Yes.

17 Q. Are there any other phones that you would have

18 used?

19 A. There was another one before the Google phone.

20 That screen just stopped working. It went blank. I

21 don't recall the model of the phone. I think it was a

22 HTC. I am not sure.

23 Q. Now, you testified before that you supplied to

24 your attorneys what you were asked to provide?

25 A. Yes.

199

1 A. No.

2 Q. If a driver had complained, there wasn't

3 anything you could do about it either way, was there?

4 MR. POLLACK: Objection.

5 A. No.

6 Q. Were the drivers given anything that would

7 identify them as being associated with The Fresh Diet?

8 MR. POLLACK: Objection.

9 A. Yes.

10 Q. What types of items would they have been given?

11 A. They were given magnets for their cars that

12 said "Fresh Diet." They were given badges with their

13 picture on it that said "Fresh Diet."

14 Q. Did they have any clothing that said "Fresh

15 Diet"?

16 A. No.

17 Q. Shirts?

18 A. No.

19 Q. Hats?

20 A. No.

21 Q. Bags themselves that the meals were in said

22 "Fresh Diet"?

23 MR. POLLACK: Objection.

24 A. Yes.

25 Q. Did you distribute these items to the drivers?

201

1 A. Yes.
 2 MR. POLLACK: Objection.
 3 Q. Where did you get these items from?
 4 A. They were sent to me.
 5 Q. Do you know who sent them to you?
 6 A. From Florida.
 7 Q. From The Fresh Diet's offices in Florida?
 8 MR. POLLACK: Objection.
 9 A. I would assume so.
 10 Q. Were drivers required to use these items?
 11 A. No.
 12 Q. It was optional on their part?
 13 A. They asked for it.
 14 Q. The drivers asked for it?
 15 A. Yes.
 16 Q. Do you know why the drivers asked for it?
 17 A. Yes.
 18 Q. What was the reason why?
 19 A. Well, the drivers asked for magnets for the
 20 cars, because they were driving around affluent
 21 neighbors in Connecticut, and New Jersey, and Long
 22 Island at night, and they were getting pulled over by
 23 the police almost every night. So they asked us if we
 24 could give them something to identify their cars as a
 25 delivery car so that they wouldn't be harassed by law

202

1 A. They were used to transport bags from New York
 2 to different locations.
 3 Q. Were they vans?
 4 A. Yes.
 5 Q. All three of them?
 6 A. Yes.
 7 Q. You said three at the beginning. Were there
 8 more after that?
 9 A. I mean, as the vehicles became old, they
 10 brought in more vehicles. They just started piling
 11 up.
 12 Q. Were these vans or other vehicles used to take
 13 meals to another distribution point?
 14 A. Yes.
 15 Q. Were these vehicles used to actually deliver
 16 meals to individual customer's homes?
 17 A. Not the vans, no.
 18 Q. Were any other vehicles used to deliver meals
 19 to customer's homes other than the driver's own
 20 vehicles?
 21 MR. POLLACK: Objection.
 22 A. Yes.
 23 Q. What vehicles were those?
 24 A. Ford Transit Connects.
 25 Q. How many of those vehicles were there?

204

1 enforcement every single night. So The Fresh Diet or
 2 Late Night, I don't know, they made the magnets for
 3 the drivers for that reason.
 4 Q. Do you recall which drivers asked for these
 5 items?
 6 A. No.
 7 Q. Was it more than one driver?
 8 A. Yes. As far as the badges, that was also
 9 something that the drivers had asked for for entering
 10 gated communities, or buildings with security, or
 11 doormen.
 12 Q. Besides the drivers with their own cars, did
 13 Late Night or The Fresh Diet own or lease any vehicles
 14 that were used to make meal deliveries?
 15 MR. POLLACK: Objection.
 16 A. I don't know if they owned or leased.
 17 Q. Were there vehicles that were used for
 18 deliveries other than the drivers' own vehicles?
 19 MR. POLLACK: Objection.
 20 A. Yes.
 21 Q. How many such vehicles were there?
 22 MR. POLLACK: Objection.
 23 A. I think there were three to begin with, if I am
 24 not mistaken.
 25 Q. How were these vehicles used?

203

1 A. Three.
 2 Q. Did certain drivers use these vehicles?
 3 MR. POLLACK: Objection.
 4 A. Yes.
 5 Q. Were certain specific drivers assigned to use
 6 these vehicles?
 7 MR. POLLACK: Objection.
 8 A. Yes.
 9 Q. Do you recall who was assigned to drive these
 10 vehicles?
 11 A. Yes.
 12 Q. Can you name those people?
 13 A. Alexander Zapata, Danny Delarossa, Drew
 14 Traverzo. Those are the ones I remember.
 15 Q. Did any driver, to your recollection, who ever
 16 used his own vehicle ever get assigned to use one of
 17 these other vehicles?
 18 A. Did they get assigned to use these vehicles,
 19 no.
 20 Q. Were they ever asked to use these vehicles?
 21 MR. POLLACK: Objection.
 22 A. No. They could request to use it if their car
 23 was not working, and they wanted to work. And if a
 24 car was available, I would let them use it.
 25 Q. That brings me to my next question. If a

205

1 driver's car had broken down, or was in an accident,
2 or otherwise unavailable, did drivers request
3 assistance from the company in dealing with those
4 situations?

5 MR. POLLACK: Objection.

6 A. Yes.

7 Q. What types of requests do you recall drivers
8 making?

9 A. If they could use the cars that we had.

10 Q. Do you recall any drivers ever asking the
11 company for loans to use to purchase replacement
12 vehicles?

13 A. No.

14 Q. Do you recall the drivers ever asking for money
15 to use to repair their own vehicles that had been
16 damaged?

17 A. I am sure it has happened.

18 Q. Do you recall it happening?

19 A. No.

20 Q. Do you recall ever giving a driver money to
21 help him repair a vehicle?

22 A. No.

23 Q. Now, why are you sure it has happened?

24 A. Because I know the drivers, and I am sure they
25 have asked. Just because -- it is just something I

206

1 A. Yes.

2 Q. How did the company compensate drivers for the
3 tolls?

4 A. They reimbursed them for the tolls.

5 Q. How were they reimbursed for tolls?

6 A. I don't understand what you mean by "how."

7 Q. How was the money given to them for the tolls
8 that they had incurred?

9 A. In their weekly checks.

10 Q. They were not separate reimbursement checks?

11 A. Not to my knowledge, no.

12 Q. When you began handling payroll, was requesting
13 reimbursement for tolls part of that responsibility?

14 A. Yes.

15 MR. POLLACK: Objection.

16 Q. How did you enter that information?

17 A. Based on the receipts that the drivers would
18 bring me for the tolls they used on the nights they
19 worked.

20 Q. So if drivers had paid tolls, they would bring
21 you receipts?

22 A. Yes.

23 Q. And they would show them to you?

24 A. Yes.

25 Q. And you would look at them and add that

208

1 know. I can't explain it. It is just something I
2 know.

3 Q. No driver ever asked you for money to repair a
4 vehicle?

5 A. I am sure they have. I don't remember it.

6 Q. You don't remember ever giving a driver money
7 to repair a vehicle?

8 A. No. Not in any particular instance, no.

9 Q. Do you remember ever doing it at any point?

10 A. Yes. But don't ask me when.

11 Q. I am not asking when. I am just saying do you
12 recall ever doing it?

13 A. Yes.

14 Q. You remember giving a driver money to repair a
15 vehicle?

16 A. Yes.

17 Q. Do you recall that happening more than one
18 time?

19 A. No.

20 Q. Do you recall how the issue of tolls incurred
21 by drivers was handled by the Late Night Express?

22 A. I am not sure what you mean by "issue"?

23 Q. When drivers would incur tolls in the course of
24 delivering meals, was that an expense that the company
25 paid for?

207

1 information into the payroll data entry?

2 A. Correct.

3 Q. And request reimbursement for those tolls for
4 those drivers?

5 MR. POLLACK: Objection.

6 A. Yes.

7 Q. Was this a consistent practice throughout the
8 time you were regional manager?

9 A. Yes.

10 Q. Do you recall any situation where a driver
11 requested money for gas from you?

12 A. From me personally?

13 Q. From you in your capacity as manager?

14 A. There is a difference. If you are asking me as
15 a manager or if you are asking me personally?

16 Q. I am not asking whether they asked you
17 personally for a personal loan. As their manager, do
18 you recall any drivers ever asking for money as their
19 manager to buy gas?

20 MR. POLLACK: Objection.

21 A. I recall drivers asking me for money for gas,
22 yes.

23 Q. Under what circumstances would drivers ask for
24 money for gas?

25 A. If they didn't have money to fill up their

209

1 cars.

2 Q. What do you remember doing on those occasions?

3 A. I don't remember the occasions. I am sure I
4 turned some of them down. I am sure I helped some of
5 them out.

6 Q. What would be the circumstances under which you
7 helped some of them out?

8 A. I don't know. I don't know what the
9 circumstances would be.

10 Q. But the money used to help them out would come
11 from the company?

12 MR. POLLACK: Objection.

13 A. Not necessarily. Sometimes it would be a
14 personal loan.

15 Q. Sometimes it would be a personal loan?

16 A. Yes.

17 Q. Sometimes you would personally give drivers
18 money for gas?

19 A. Yes.

20 Q. And they would pay you back?

21 A. Yes.

22 Q. Do you recall a situation where funds were ever
23 provided by the company for the purpose of purchasing
24 gas?

25 MR. POLLACK: Objection.

210

1 A. For the drivers driving the vans to the other
2 distributions, they might have been given the cards to
3 fill up the vans.

4 Q. Do you recall any drivers who used their own
5 personal vehicles ever being provided with company
6 credit cards for any reason?

7 MR. POLLACK: Objection.

8 A. Not that I recall, no.

9 Q. Do you recall the company, and when I say "the
10 company," either Late Night for The Fresh Diet, ever
11 trying to find replacement vehicles for the drivers in
12 instances where their cars had been damaged?

13 MR. POLLACK: Objection.

14 A. No.

15 Q. Now, the former owner of Balance for Life was
16 Mr. Sutter?

17 MR. POLLACK: Objection.

18 A. Yes.

19 Q. Have you actually met him in person?

20 MR. POLLACK: Objection.

21 A. Yes.

22 Q. This is while you were working for Balance for
23 Life?

24 A. Yes.

25 Q. Did he ever tell you that he was selling his

212

1 A. I don't recall a situation.

2 Q. Do you recall whether it ever happened?

3 A. It has happened.

4 Q. It has happened?

5 A. Yes.

6 Q. There have been instances where the company has
7 paid for a driver's gas?

8 MR. POLLACK: Objection.

9 A. There have been instances when the company has
10 loaned drivers money for gas.

11 Q. And the drivers were expected to pay the money
12 back?

13 A. Yes.

14 Q. Did they do so?

15 A. Yes.

16 Q. In every instance?

17 MR. POLLACK: Objection.

18 A. To my knowledge.

19 Q. Did Late Night have any company credit cards?

20 A. Yes.

21 Q. Were any of those company credit cards ever
22 given to drivers for any reason?

23 A. Possibly, yes.

24 Q. What were the circumstances under which a
25 credit card might be given to a driver?

211

1 company to The Fresh Diet?

2 MR. POLLACK: Objection.

3 A. I do not remember the conversation.

4 MR. ANDREWS: I don't have any further
5 questions for you at this time, Mr. Hussain. Thank
6 you.

7 (Time noted: 3:58 p.m.)

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